

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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In the Matter of )

AT&T Corp. )

Petition for Rulemaking to Reform )  
Regulation of Incumbent Local Exchange )  
Carrier Rates for Interstate Special )  
Access Services )  
\_\_\_\_\_ )

RM No. 10593

**JOINT COMMENTS OF  
PAC-WEST TELECOMM, INC. AND US LEC CORP.**

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Dated : December 2, 2002

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Pac-West Telecomm, Inc. ("Pac-West") and US LEC Corp. ("US LEC") (sometimes referred to collectively as "Joint Commenters"), by their undersigned counsel and pursuant to section 1.401 of the Commission's rules, 47 C.F.R. § 1.401, respectfully submit the following comments pursuant to the Federal Communications Commission's ("Commission") Public Notice, released on October 29, 2002, regarding the above-captioned proceeding.<sup>1</sup>

Joint Commenters strongly support the request of AT&T Corp. ("AT&T") that the Federal Communications Commission ("Commission" or "FCC") promptly initiate a rulemaking proceeding to reform and tighten the rate regulation of price cap incumbent local exchange carriers' ("ILECs") special access services. Joint Commenters also support AT&T's proposal for the adoption of interim relief measures by the Commission during the pendency of the rulemaking, including the reduction of all special access charges for services subject to Phase II

pricing flexibility to rates that would produce an 11.25% rate of return, as well as the establishment of a moratorium on consideration of further pricing flexibility applications. Joint Commenters furthermore agree with AT&T that the Commission should mandate that access purchasers may take advantage of the interim rate relief without triggering any termination liabilities or other penalties from the ILEC provider.

## INTRODUCTION AND SUMMARY

Joint Commenters emphatically agree with AT&T that the current pricing flexibility regulatory regime established in 1999 is in need of immediate reexamination by the Commission. In fact, over the course of the last year, Joint Commenters have filed comments in various BOC pricing flexibility proceedings suggesting the very same course of action.<sup>2</sup>

As customers of Bell Operating Company ("BOC") special access services, Joint Commenters have experienced first-hand the BOCs' now common practice of charging increasingly exorbitant rates for these services. Joint Commenters would prefer to use alternate providers for these services, but with none generally available, Joint Commenters, like other special access customers, are forced to continue to pay the unreasonable, exorbitant rates charged by the BOCs for these services.

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<sup>1</sup> *Wireline Competition Bureau Seeks Comment on AT&T's Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM 10593, Public Notice, DA02-2913 (rel. Oct. 29, 2002).

<sup>2</sup> See Comments of Pac-West Telecomm, Inc., *Petition of Pacific Bell Telephone Company for Pricing Flexibility as Specified in Section 69.727 of the Commission's Rules for the Los Angeles/Long Beach, CA MSA*, CCB/CPD File No. 02-03, at 2-5 (filed Feb. 11, 2002) ("*PacWest Comments on PacBell Pricing Flexibility Request*"); Joint Comments of Focal Communications Corporation and Pac-West Telecomm, Inc., *Petitions for Pricing Flexibility for Special Access and Dedicated Transport Services for Ameritech Operating Companies, Pacific Bell Telephone Company, Southern New England Telephone Company, and Southwestern Bell Telephone Company*, CCB/CPD File Nos. 01-32, 01-33, 01-34, 01-35, at 3-7 (filed Jan. 3, 2002) ("*Joint Comments on Ameritech, PacBell, SNET and SWBT Pricing Flexibility Requests*"); Joint Comments of Focal Communications Corporation, Pac-West Telecomm, Inc., and US LEC Corp., *Verizon Petition for Pricing Flexibility for Special*

Likewise, the BOC special access rate of returns documented by AT&T, some as much as almost 55%, are astounding. Joint Commenters concur that the Commission cannot deny that the special access rates charged by the ILECs are so grossly excessive that they constitute unlawful, unreasonable rates in violation of the Communications Act.

Unfortunately, it is no coincidence that the rates for BOC special access services have been increasing as special access pricing flexibility requests have been granted. Joint Commenters agree with AT&T that the fact that BOCs are able to raise special access prices in this manner is conclusive evidence that the current pricing flexibility regime, based on collocation triggers, is not working as the Commission had hoped. Moreover, market conditions have proven that the Commission cannot rely on collocation triggers as a meaningful assessment of competition warranting pricing flexibility for BOC special access services. Instead, Joint Commenters submit that the Commission should consider a variety of other criteria that would be better indicia of competition than a simple query as to whether Competitive Local Exchange Carriers (“CLECs”) have established a benchmark level of collocation arrangements in a given market.

Accordingly, Joint Commenters strongly support AT&T’s proposal for a rulemaking to reexamine the special access pricing flexibility regime in order to correct the market power abuses in which the BOCs are currently engaged as monopoly providers of special access services. Joint Commenters also concur that the interim relief requested by AT&T is necessary in order to protect special access customers from continuing to endure the BOCs blatantly

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*Access and Dedicated Transport Services*, CCB/CPD File No. 01-27, at 2-5 (filed Dec. 14, 2001) (“*Joint Comments on Verizon Pricing Flexibility Request*”).

unreasonable, unlawful charges for these services, which will most assuredly continue to occur during the entire duration of this proceeding if not halted by the Commission.

**I. BOC UNLAWFUL SPECIAL ACCESS RATES REQUIRE REVIEW BY THE COMMISSION**

Joint Commenters applaud AT&T's diligent efforts to document the grossly excessive rates-of-return enjoyed by the BOCs as pricing flexibility petitions have been granted. These exorbitant rates of return, some as high as 55%, cannot be ignored by the Commission. As indicated by AT&T, under the Communications Act, the Commission has a duty to ensure that rates for telecommunications services are just and reasonable.<sup>3</sup> Rates-of-return that approach 50% and beyond cannot, on their face, support any claim by the BOCs that the rates for special access services are reasonable or constrained by competition, particularly when the BOC rates-of-return for these services under price cap regulations typically were less than half as much.<sup>4</sup>

As customers of BOC special access services, Joint Commenters have first-hand experience with the BOC special access rate increases described by AT&T. For example, last year, BellSouth instituted wide-ranging price increases for key special access services so that prices for these products in areas where BellSouth has been granted pricing flexibility are significantly higher than in other areas. Joint Commenters, along with other CLECs, have repeatedly pointed out these price increases in various pricing flexibility proceedings over the course of the last year.<sup>5</sup>

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<sup>3</sup> *AT&T Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, at 34 (filed Oct. 15, 2002) ("AT&T Petition")

<sup>4</sup> *AT&T Petition*, Tab A, Friedlander Declaration, Exhibit 1. As documented by AT&T, the BOC rate of returns for special access services prior to pricing flexibility typically ranged from 2.14% to 13.57%. *Id.*

<sup>5</sup> See *PacWest Comments on PacBell Pricing Flexibility Request* at 8-9; *Joint Comments on Ameritech, PacBell, SNET and SWBT Pricing Flexibility Requests* at 9-10; *Joint Comments on Verizon Pricing Flexibility Request* at 8-9.

In the Commission's 1999 *Pricing Flexibility Order*, the Commission envisioned that competition, as measured by the triggers, would be sufficient to assure that rates for special access are reasonable.<sup>6</sup> However, the fact that BOCs granted pricing flexibility are raising prices shows that the Commission's pricing flexibility rules are not working.

Rather than pay the exorbitant special access rates charged by the BOC, Joint Commenters would prefer to purchase these services from other providers. Unfortunately, as AT&T has pointed out, currently there are virtually no alternatives for special access customers.<sup>7</sup> Pac-West, in particular, has extensive experience in this regard. Pac-West, as a purchaser of special access services in California for the last 6 years, has repeatedly made efforts to obtain the special access services it needs for its California network from suppliers other than SBC, but to no avail. Pac-West constantly reviews all potential suppliers for special access services, but continually finds that there are generally no alternate vendors that provide effective substitutes for SBC special access services.

Joint Commenters agree with AT&T that the lack of alternate providers can be linked to a number of factors, including the dramatic change in economic conditions,<sup>8</sup> the huge sunk investment cost for establishing special access services,<sup>9</sup> as well as the use and commingling restrictions on enhanced extended links ("EELs").<sup>10</sup> Regardless of the cause, the reality is that the BOCs have been, and continue to be, monopoly providers of special access services, as demonstrated by the dramatic increase in pricing over the past few years as price cap regulation

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<sup>6</sup> *Access Charge Reform*, Fifth Report and Order and Notice of Proposed Rulemaking, 14 FCC Rcd. 14221, at ¶¶ 69-70 (1999) ("*Pricing Flexibility Order*").

<sup>7</sup> *AT&T Petition* at 16, 25.

<sup>8</sup> *Id.* at 27.

<sup>9</sup> *Id.* at 16-17.

has been gradually removed for these services. If competition for special access services truly existed, then the market would not allow BOCs to reap the inflated rates-of-return they currently enjoy on these services. In a competitive market, the BOC rates-of-return for these services would be closer to those earned prior to the elimination of price cap regulation. Instead, the BOCs are able to charge monopoly profits that are in excess of normal profits earned under competitive market conditions.

As AT&T has pointed out, in establishing the current pricing flexibility regime, the FCC recognized the possibility that BOCs may abuse their market power in special access services.<sup>11</sup> The Commission further acknowledged that pricing flexibility could be lawful only to the extent that the BOCs would not raise rates to “unreasonable levels” for customers that lack “competitive alternatives.”<sup>12</sup> Unfortunately, both of these concerns have proven true, and for this reason, the Commission has an obligation to reexamine its pricing flexibility rules as soon as possible. Otherwise, it is almost certain that the BOCs will continue to raise prices for special access services to even higher levels, and meanwhile, special access customers, such as Joint Commenters, will be forced to remain captive to the BOCs monopoly rates for the indefinite future.

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<sup>10</sup> *Id.* at 17.

<sup>11</sup> *Id.* at 19 (citing *Pricing Flexibility Order* at ¶ 79).

<sup>12</sup> *Id.* at 15 (citing *Pricing Flexibility Order* at ¶ 3).



**II. COLLOCATION “TRIGGERS” CURRENTLY IN PLACE ARE NOT A MEANINGFUL ASSESSMENT OF COMPETITIVE MARKET CONDITIONS WARRANTING PRICING FLEXIBILITY**

Joint Commenters strongly agree with AT&T that the Commission’s existing pricing flexibility rules are not working. The collocation pricing flexibility triggers have not proven to be a correct measure of the competitive forces that would warrant pricing flexibility.

When the Commission established the rules for granting price cap ILECs flexibility in the pricing of their interstate access services in its *1999 Pricing Flexibility Order*, the Commission reasoned that pricing flexibility could be granted in situations where the price cap ILEC was able to show that “markets are sufficiently competitive both to warrant pricing flexibility to enable ILECs to respond to competition and to discourage incumbents from either excluding new entrants or raising rates to unreasonable levels.”<sup>13</sup> At that time, the Commission believed that collocation arrangements were an “important indicator” of irreversible entry by competitive providers and thus could form the basis for “triggers” to “demonstrate that market conditions in a particular area warrant the relief at issue.”<sup>14</sup> The Commission assumed that even if an incumbent would be successful in driving out a collocated competitor, the facilities of that competitor could be bought by another competitive provider to compete with the incumbent’s services.<sup>15</sup>

Unfortunately, market conditions in the telecommunications industry unexpectedly have changed greatly since 1999. As the Commission knows, over the past two years, numerous competitive carriers have either exited the market entirely or have left many market locations.<sup>16</sup>

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<sup>13</sup> *Pricing Flexibility Order* at ¶ 68.

<sup>14</sup> *Id.* at ¶¶ 79-80.

<sup>15</sup> *Id.* at ¶ 80.

<sup>16</sup> See, e.g., *Comments Invited on ACC Telecommunications, LLC. and ACC Telecommunications of Virginia, LLC (Colorado) Application To Discontinue Domestic Telecommunications Services*, Comp. Pol. File No. 616, Public Notice, DA 02-3193 (rel. Nov. 18, 2002); *Comments Invited on ACSI Local Switched Services, Inc., d/b/a*

As a result, it appears that a large number of collocation facilities of competitive providers have been decommissioned or sit idle in central offices.

This is particularly the case with respect to collocation space that carriers had planned to use to provide DSL service. The recent market difficulties of major DSL carriers are cases in point. Other carriers that had planned to provide DSL service although not as primary service, are also decommissioning collocation space. It is also worth noting that a number of carriers are apparently maintaining non-operational collocation space, at least on a short term basis, in order to avoid up-front decommissioning charges and expenses, which average about \$20,000 per collocation space.

Instances of unused collocation space are also all the more likely because of the new market rules that were adopted last year by the Commission governing reciprocal compensation and CLEC interstate access charges. Under these new rules, intercarrier compensation for Internet Service Provider ("ISP")-bound traffic is prohibited in markets not served by the CLEC at the time the action became effective. Similarly, CLECs entering new markets after June 20, 2001 must tariff rates for access services at the substantially lower ILEC rate in those markets.<sup>17</sup> Without adequate notice of these impending new rules, many CLECs began investing in new markets, including the build-out of collocation facilities, based on business plans that

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*e.spire Communications, Inc., Application to Discontinue Domestic Telecommunications Services*, Comp. Pol. File No. 592, Public Notice, DA 02-1577 (rel. July 16, 2002); *Comments Invited on Edge Communications, Inc. Application to Discontinue Domestic Telecommunications Services*, NSD File No. W-P-D-573, Public Notice, DA 02-715 (rel. Mar. 26, 2002). See also J. Molloy and E. McKeever, *The Good, The Bad, and The Ugly: Stratification Continues As the Shakeout in the CLEC Corral Rolls On*, The Mirus Online Newsletter, (RCW Mirus), December 2001, at [http://www.imakenews.com/rcwmirus/e\\_article000017427.cfm](http://www.imakenews.com/rcwmirus/e_article000017427.cfm).

<sup>17</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 9-68, Order on Remand Report and Order, FCC 01-131 (rel. Apr. 27, 2001); *Access Charge Reform: Reform of Access Charges by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262, FCC 01-146 (rel. Apr. 27, 2001).

incorporated the then-existing regulatory environment.<sup>18</sup> The dramatic, sudden changes in the regulatory requirements governing CLEC access charges and ISP-bound traffic embodied in the new-market rules and growth ceiling have slowed or halted CLEC investment in new markets, and made it more difficult for CLECs to economically use collocation facilities installed but not yet operational.

It is now clear, therefore, that the premise that formed the basis for allowing pricing flexibility under the Commission's rules – namely, that collocation arrangements demonstrate irreversible entry by competitors – has proven to be an inaccurate indicator of competitive market forces. Contrary to assertions of the Commission's *Pricing Flexibility Order*, the existence of competitive collocation arrangements does not demonstrate that multiple rivals have entered the market, that any sunk investment will be irreversible, or that competitive carriers cannot be driven out so as to prevent exclusionary pricing behavior on behalf of the incumbent.<sup>19</sup> The collocation "triggers" established by the Commission in 1999 are no longer, if they ever were, a meaningful assessment of the competitive conditions in the particular MSA and thus should no longer be used by the Commission to determine whether pricing flexibility is warranted in a particular situation, and certainly not in light of current market conditions.

Accordingly, Joint Commenters strongly support AT&T's request that the Commission reexamine its pricing flexibility rules, drawing from the experience the market has taught over the last few years. Joint Commenters further submit that the Commission should consider other

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<sup>18</sup> Petition for Reconsideration of Focal Communications Corporation and US LEC Corp., *Access Charge Reform: Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262 (filed June 20, 2001).

<sup>19</sup> *Pricing Flexibility Order* at ¶ 80.

criteria that likely would better establish market conditions warranting pricing flexibility for special access services.

For example, the California Public Utilities Commission (“PUC”) considers many market factors in deciding whether BOC special access services should be reclassified as “Category III” services subject to pricing flexibility under the California PUC’s “new regulatory framework,” which is essentially the equivalent of “Phase II” special access pricing flexibility under the Commission’s current rules. The California PUC has denied such requests by Pacific Bell, finding that Pacific Bell had failed to demonstrate that it did not possess significant market power in the special access markets it intended to serve.<sup>20</sup> The criteria that the California PUC has identified to assess the level of competition in a particular market includes:

- Market share;
- Ease of entry and exit;
- Number of competitors;
- Market trends;
- Estimations of capital investments necessary to compete;
- Status of unbundling efforts by the local exchange carriers;
- Facilities ownership;
- Size and growth capability of competitors;
- Local exchange carrier return on equity;
- Rate of return on marginal investment;
- Competitors earnings (to the extent available);
- Substitutable services and studies regarding the cross elasticities of demand;
- Rates, terms, and conditions of substitutable services; and
- Whether a utility affiliate offers a competitive service.<sup>21</sup>

These criteria are much better indicia of competition than the simple query whether CLECs have established a benchmark level of collocation arrangements. Because collocation

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<sup>20</sup> *Application of Pacific Bell Telephone Company for Authority to Categorize Special Access and ISDN Services as Category III Services*, A.00-11-004, D.01-08-066, Order of Dismissal, at 9 (CA PUC Aug. 29, 2001).

<sup>21</sup> *Id.* at 2-3.

arrangements alone demonstratively do not indicate the true level of competition, Joint Commenters agree with AT&T that the Commission should terminate further consideration of pricing flexibility requests under current rules until it has the opportunity to fashion revised rules.<sup>22</sup>

With respect to the pricing flexibility requests submitted by BOCs under the current regulatory regime, the Commission cannot be assured that the existence of the collocation arrangements described by the BOCs shows that competitive conditions exist that would prevent these companies from engaging in exclusionary pricing behavior to the detriment of the competitive providers remaining in those locations. Rather, as discussed, given current market conditions, it is entirely possible that collocation space abandoned by a CLEC due to bankruptcy, the new-market rules, or other reasons will not be purchased by other competitors, and, therefore, does not represent evidence of irreversible competition. The restriction on growth of compensable ISP-bound traffic further serves as a disincentive to deploy facilities or acquire them from other carriers. It is additionally worth noting that ILECs' unreasonable practices, such as unreasonable charges for DC power, can also make it difficult for CLECs to meaningfully use collocation space and/or make it less attractive for purchase or use by other carriers.

Accordingly, Joint Commenters respectfully urge the Commission to halt the consideration of pricing flexibility requests until such time as the Commission has had an opportunity to reexamine the effectiveness of its current pricing flexibility rules. Additionally, as an interim measure, the Commission cannot allow the BOCs to continue to charge unlawful

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<sup>22</sup> *AT&T Petition* at 39.

rates for special access services and thus should require all special access services rates be reduced so that the BOC rate of returns are restored to reasonable levels in place prior to pricing flexibility, such as 11.25% as suggested by AT&T, without termination liabilities or other penalties being assessed to special access customers.

## **CONCLUSION**

For the reasons stated herein, Joint Commenters strongly support the initiation of a rulemaking proceeding to reexamine, reform and tighten the rate regulation of price cap ILECs' special access services. Joint Commenters also agree with AT&T that the Commission should adopt interim measures, pending completion of the rulemaking proceeding, including the reduction of all special access charges for services subject to Phase II pricing flexibility, without penalties to customers, to rates that would produce an 11.25% rate of return, as well as the establishment of a moratorium on consideration of further pricing flexibility applications.

Respectfully submitted,



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Dated : December 2, 2002

**CERTIFICATE OF SERVICE**

I hereby certify that on this 2<sup>nd</sup> day of December 2002, copies of the foregoing **Joint Comments of Pac-West Telecomm, Inc. and US LEC Corp.** were sent via Messenger or Federal Express, where indicated, to the following:

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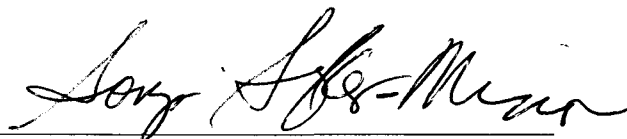
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